RECEIVED
13
JUN 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-6922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSE DE LA ROSA,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

CHRYSANTHE A. LAMBROS
Lambros, Clay & Justice
205 North Presa Street
San Antonio, Texas 78205
(512) 224-2100

RONALD P. GUYER
Law Office of Ronald P. Guyer
205 North Presa Street
San Antonio, Texas 78205
(512) 224-2100

ATTORNEYS FOR PETITIONER
JESSE DE LA ROSA

PROCEEDING IN FORMA PAUPERIS

INDEX

	Page
Table of Cases and Statutes	i
Constitutional and Statutory Provisions Involved	ii
Citation and Opinion Below	1
Jurisdiction	1
Questions Presented for Review	2
Question Number One (restated)	3
A. Statement of Pertinent Facts	3
B. How the Question Was Raised and Disposed of Below	7
C. Reasons For Granting the Writ	7
Question Number Two (restated)	17
A. Statement of Pertinent Facts	18
B. How the Question Was Raised and Disposed of Below	22
C. Reasons For Granting the Writ	23
Question Number Three (restated)	28
A. Statement of Pertinent Facts	28
B. How the Question was Raised and Disposed of Below	30
C. Reasons for Granting the Writ	31
Prayer	35
Proof of Service	36
Appendix A	37
Appendix B	46

TABLE OF CASES AND STATUTES

CASES:	Page
California v. Prysock, 453 U.S. 355 (1981)	14,15
Cote v. U.S., 357 F.2d 789 (9th Cir. 1966)	26,27
Dillon v. U.S., 391 F.2d 433 (10th Cir. 1968)	26,27
Irvin v. Dowd, 366 U.S. 717 (1971)	31,35
Lathers v. U.S., 396 F.2d 524 (9th Cir. 1968)	6,11,14,15
McNabb v. U.S., 318 U.S. 332 (1943)	23
Mallory v. U.S., 354 U.S. 449 (1957)	23,25,26
Michigan v. Mosely, 423 U.S. 96, on remand, People v. Mosely, 249 N.W.2d 393, aff'd, 254 N.W.2d 29, cert. denied, 434 U.S. 861 (1975)	9
Miranda v. Arizona, 384 U.S. 436 (1966)	6,11,12,13 16,17,23
Ricks v. U.S., 334 F.2d 964	27
Smith v. Estelle, 451 U.S. 454 (1981)	9
Smith v. Phillips, 102 S.Ct. 940 (1982)	32,34,35
Smith v. U.S., 390 F.2d 401	26,27
Thomas v. U.S., 394 F.2d 247 (10th Cir. 1968), cert. denied, 394 U.S. 931	24,26
U.S. v. Bear Killer, 534 F.2d 2153 (8th Cir. 1976)	27
U.S. V. Hernandez, 574 F.2d 1362 (5th Cir. 1978)	24,25
U.S. v. Marrero, 450 F.2d 373 (2nd Cir. 1971)	26,28
Westover v. U.S., 384 U.S. 494 (1966)	16
RULE 5(a), FEDERAL RULES OF CRIMINAL PROCEDURE	23
ARTICLE 15.17, TEXAS CODE OF CRIMINAL PROCEDURE	23
ARTICLE 42.12(c)(1[illegible](b), TEXAS CODE OF CRIMINAL PROCEDURE	29
ARTICLE 40.07, TEXAS CODE OF CRIMINAL PROCEDURE	32
§19.03(a)(2), TEXAS PENAL CODE	2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. This case involves the Fifth Amendment right against compulsory self-incrimination, the Sixth Amendment right to trial by jury, the Sixth Amendment right to counsel, and the due process clause of the Fourteenth Amendment.

II. This case also involves the following provision of federal law: Rule 5(a), Federal Rules of Criminal Procedure.

III. This case also involves the following provisions of Texas law: Article 15.17, Texas Code of Criminal Procedure; Article 40.07, Texas Code of Criminal Procedure.

STATEMENT TO THE COURT REGARDING INDEXING OF THE TRIAL RECORD

In the course of preparing the instant petition for certiorari, counsel for Petitioner has become aware that the court reporter responsible for preparing the record of the trial proceedings has made an error in the numbering of the volumes. Specifically, the number of each volume which appears on the outside cover is consistently one number off of the volume number appearing in the contents of each file jacket. It is unknown to counsel whether a similar error was committed in the original record presently in the care of the Texas Court of Criminal Appeals. Counsel wishes to advise the Court, for purposes of clarification, that all references to the record are references to the volume number as it appears on the outside front cover of each of the twenty one file jackets which comprise the record.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

JESSE DE LA ROSA,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF TEXAS

The Petitioner, JESSE DE LA ROSA,[1] respectfully prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered March 9. 1983. Motion For Leave To File Motion For Rehearing in this cause was denied by said court on April 13, 1983.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is not yet reported. A true copy of the slip opinion issued by the court is attached hereto as Appendix A. A true copy of the postcard notification advising counsel of the denial of rehearing is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below, and asserting herein, the deprivation of rights secured by the Constitution of the United States.

---

1. There are no other petitioners in this cause.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE: Whether Petitioner's written confessions were inadmissable, as having been obtained during custodial interrogation, following the administering of explanatory warnings regarding his Constitutional rights which did not satisfy the requirements of Miranda v. Arizona.

QUESTION TWO: Whether Petitioner's written confessions were inadmissable as having been obtained during custodial interrogation in a manner violative of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel, resulting from unreasonable delay in bringing Petitioner before a magistrate.

QUESTION THREE: Whether Petitioner was denied the right to a trial by a fair and impartial jury as the result of occurrences in the jury room during the deliberations on punishment, to wit: (1) erroneous statements made, and beliefs held, by three jurors regarding the laws of parole and (2) prejudicial comments of a juror regarding future dangerousness, which were not based upon the sworn evidence, but upon the experiences of the juror's stepfather.

STATEMENT

By an indictment filed on April 23, 1980, Jesse De La Rosa was charged with the capital murder [1] of Masoud Ghazali (Tr. 38), to which he pleaded not guilty. An evidentiary hearing on the defendant's Motion To Supress his written statements was conducted on June 22 and 23, 1981. (Tr. 39). At the conclusion of this hearing, the jury selection process began. (Tr. 39) Voir dire extended from June 23 through July 8, 1981. (Tr. 39-40) During the period extending from July 9 through July 16, 1981, Petitioner was tried for capital murder before the 144th Criminal District Court of Bexar County, Texas (Tr. 40). Following the guilt/innocence phase of a bifurcated trial, he was convicted of capital murder.

1. The specific type of capital murder with which Petitioner was charged was murder committed in the course of robbery or attempted robbery, §19.03(a)(2), Texas Penal Code.

Following the presentation of evidence at the punishment phase, he was sentenced to death by lethal injection. (Tr. 260). His conviction was affirmed by the Texas Court of Criminal Appeals on March 9, 1983. (Appendix A). Motion For Leave to File Motion For Rehearing was denied by the Court of Criminal Appeals on April 13, 1983. (Appendix B). It is out of the foregoing trial and conviction that the instant Constitutional questions arise.

QUESTION NUMBER ONE

Whether Petitioner's written confessions were inadmissable as having been obtained during custodial interrogation following the administering of explanatory warnings regarding Petitioner's Constitutional rights which did not satisfy the requirements of Miranda v. Arizona.

A. Statement of Pertinent Facts

Jesse De La Rosa was arrested at 5:30 p.m. on Wednesday, August 27th, 1979 (II, P. 87; XVI, P. 133). The arrest was based on a warrant for aggravated robbery. (II, P. 208). Following his arrest and incognito[2] interrogation, Petitioner confessed to the commission of the robbery for which the warrant had issued. The interrogating officer also elicited from Petitioner a confession to a capital murder which occurred on the same night as the robbery. (Tr. 5,6).

Petitioner underwent a bifurcated trial. The first phase of the trial was devoted to the determination of guilt or innocence of the offense charged. Inasmuch as Petitioner was tried only for the capital murder, and not for the robbery, only the capital murder confession (the second statement elicited) was introduced at the guilt/innocence phase of the trial. (XXI, Ex. 32). The robbery confession was, however, eventually admitted in evidence at the punishment phase of the trial. (XXI, Ex. 33).

The voluntariness and admissability of both confessions was challenged in the hearing on Petitioner's Motion To Suppress. (II, P. 9-264; III, P. 2-76). Because it introduced no other evidence

2. Petitioner's interrogation was incognito, in that he was isolated with one interrogating officer, Detective Michalec, and not permitted to have contact with any persons who were at liberty. Although he was permitted (cont'd)

which was probative of Petitioner's guilt [3], the prosecution relied almost exclusively upon the Petitioner's confessions to secure his conviction and death sentence.

At the time of his arrest at 5:30 in the afternoon, following a foot chase by officers, (XVIII, P. 104-5), Petitioner was apprehended and ordered to lie face down on the ground at gun point, where he was handcuffed. (XVIII, P. 105) He was taken to a police squad car where Officer Andy Vaquera administered the Miranda warning to Petitioner for the first time, in proper Spanish. (XVI P. 211; XVIII, P. 107). The right to counsel was, additionally, explained by the arresting officer in colloquial or "street" Spanish. (XVIII, P. 110). This explanatory warning was confined to the following: "Do you want a lawyer?" (XVIII, P. 110). This warning did not advise Petitioner of the right to counsel prior to and during questioning. The Petitioner did not refuse counsel at this time; rather, he simply did not reply. (XVIII, P. 110). At the time the warnings were read to him, Petitioner was very excited, panting, and sweating profusely. (XVIII, P. 118).

Petitioner received the Miranda warning for the second time approximately seven minutes later from Detective Anton Michalec of the San Antonio Police Department. Initially, the officer read the warning off of a standard police-issued warning card, while transporting Petitioner in a squad car to police headquarters. (II, P. 211; XVI, P. 87). Following the administering of the standard, formal warning, however, Detective Michalec elected to give Petitioner additional, "explanatory" warnings. (II, P. 211; XVI, P. 87). The warning he testified to giving Petitioner was as follows:

> "I was explaining that ... he has the right to get an attorney if he wants one if not an attorney will be appointed free of charge and I generally try to make -- I tell tham that it will take some time before the Court will get around to appointing a lawyer for them. And, explained to him that really what the whole warning really means they don't have to say anything to us if they don't want to." (II, P. 211).

---

2. (cont'd) a brief encounter with his wife, brother and friend during interrogation, these individuals had been arrested with Petitioner and were in custody, (II, P. 255, XVI,P 129), kept separated from Petitioner.(II, 257-8).
3. The State introduced several other items of evidence in order to prove that the crime had occurred, including pictures of the deceased, three spent shells, three spent slugs and two fingerprints which could not be dated to the time of the offense, and could have been deposited months prior. (XVI, P. 25) All the ballistics evidence related to an unknown gun, which was never (cont'd)

On direct examination by the prosecutor, the officer indicated that these were the only warnings given to the Petitioner prior to the interrogation and taking of the first confession.[4] (XVIII, P. 99). Petitioner was brought to the identification section of the police department, and was then brought directly to the robbery division for interrogation by Detective Michalec. (II, P. 212). He was not brought before a magistrate for arraignment until some four hours and forty minutes after interrogation began.

At some time shortly after the interrogation began, Detective Michalec testified to having asked Petitioner "if he wanted his attorney present." (II, P. 212). Because Detective Michalec had not brought Petitioner to a magistrate, he of oourse had no appointed counsel at the time. The officer's inquiry, therefore, cannot seem to be logically construed as a reference to appointed counsel, since Petitioner had none and the officer was aware of this. The more logical inference is that the question inquired as to whether Petitioner wanted retained counsel. De La Rosa, an 18 year old Mexican American indigent, did not have retained counsel.

At this time, concurrent with Petitioner's arrest, police had also taken into custody Petitioner's wife Maria, his younger brother George, and a friend Victor San Miguel. (II, P. 255; XVI, P. 129). Officers had no warrants for the arrest of any of these individuals (II, P. 255; XVI, P. 116), nor had they committed any offense in the presence of the authorities. (XVI, P. 129). They were not charged by the police with any wrongdoing whatsoever (XVI,P. 129) nor was it alleged that they had participated in or in any way been connected with the offense for which Petitioner was arrested. Defense counsel asserted at the Motion To Supress that Petitioner's wife, brother and friend were taken into custody for the purpose of intimidating Petitioner and placing psychological pressure upon him. (II , P. 255). If, in fact, these three indi-

---

introduced into evidence, nor was it connected with Petitioner. These miscellaneous items of evidence, while they did help to establish the commission of an offense, did not tend to show that Petitioner had, in fact, committed that offense. As such they were not probative of his guilt. The state conceeded that in the absence of the confession, there existed insufficient evidence to support a verdict of guilt. (XVIII, P. 165.)

4. This is consistent with the written statement, completed at 7:50, but which states that the warnings were admistered at 5:37, which was seven minutes after the arrest and over an hour before the confession began.(XXI, Exhibit 34).

viduals were held for any reason other than for the purpose of placing pressure upon the accused, then the record does not reflect what those reasons were. The explanation offered by Detective Michalec, to wit: that the three were brought in for questioning, would appear plausible were it not for the fact that Officers Michalec, Carnot and Coronado testified that they did not, in fact, interrogate Maria De La Rosa, George De La Rosa, or Victor San Miguel. (XVI, P. 129: XVII , P. 73; XVIII, P. 42). Petitioner's wife, brother and friend were not released from custody until after Petitioner had signed both confessions. (II, P. 257).

Following Detective Michalec's inquiry as to whether Petitioner wanted "his attorney" present, and having previously been advised by the officer that it would take some time before the court would get around to appointing him counsel, Petitioner stated that he would rather see his brother. (II, P. 213). Thereafter, Petitioner's wife, brother and friend were brought into the interrogation room. Petitioner's wife and brother were crying and extremely upset. [5] (II, P. 22). Immediately after Petitioner's wife, brother and friend were taken out of the interrogation room, and without administering further Miranda warnings (II, P. 213; XVIII, P. 99), Detective Michalec stated that he "sat down and took a statement from him (Petitioner) and started a story and told him we was going to have to start a story in this thing." (II, P. 213).

Beginning at 6:54 p.m., Detective Michalec interrogated Petitioner and elicited a confession from him regarding the robbery. (Tr. 5). The statement was typed on a printed confession form by the officer, while he interrogated the Petitioner. It should be noted that although the printed form contained a Miranda warning, this form was in the officer's typewriter. Petitioner, who was sitting on the other side of the typewriter, would not have been in a position to read this warning. (XIX, P. 101). The first confession was completed at a few minutes prior to 8:00 p.m.

---

5. George De La Rosa testified that Officer Michalec, during this brief meeting, was present in the interrogation room and threatened to place George and Maria De La Rosa in jail if Petitioner did not give him the information he was seeking. He further testified that Michalec told Petitioner that if his wife was jailed, their baby would be removed by the welfare department. (II, P. 21-23). Miranda v. Arizona does not require that an interrogation be recorded. Characteristically, the allegations of Petitioner's brother were denied by Officer Michalec, who did not record the interrogation. Hence, we are presented by another in the "plethora of swearing contests" noted by the Fifth Circuit in Lathers v. United States, 396 F. 2d 524 (5th Cir. 1968)(Footnote 7).

The Petitioner's signature was witnessed by two San Antonio Police Department civilian employees between 7:50 and 8:00 p.m. (II,217-18). These employees witnessed only the signature of the instrument, and were not present during the questioning. (XVI, P. 171).

At 8:00, Detective Michalec administered the second of his Miranda warnings to Petitioner, prior to the capital murder confession. (XVIII, P. 91). Once again, the officer admonished the Petitioner that it would take time before he would be able to obtain appointed counsel. (XVIII, P. 93). It was not until immediately after Petitioner signed the second confession that he was brought before the magistrate for arraignment (XVIII, P. 100).

B. How The Question Was Raised and Disposed of Below

The admissability of the confession was raised at the trial level in Petitioner's Motion to Supress. Objections to the introduction and admission of the confessions were raised at all appropriate times during the conduct of the trial. On appeal, Petitioner raised the issue in four grounds of error, one of which specifically addressed the inadequacy of the Miranda warnings given to Petitioner by Officer Michalec. (Ground of Error Ten, Appellant's Brief, p. 27 et. seq.) The Court of Criminal Appeals disposed of these four grounds of error in two brief paragraphs. (Appendix A, Page 5). Without citation to the record, the court concluded that Petitioner had received his Miranda warnings prior to giving his confessions. The court wholly failed to address the issue, raised by Petitioner, as to the sufficiency of those warnings, nor did its opinion deal in any way with the statements made by Officer Michalec that it would take time before the court would "get around to" appointing counsel for Petitioner.

C. Reasons For Granting The Writ

The question presented for the Court's review is whether the confessions elicited from Jesse De La Rosa during incognito custodial interrogation were obtained in violation of his Fifth Amendment right against compulsory self-incrimination, following the administration of warnings which did not conform to the dictates

of Miranda v. Arizona, 384 U.S. 436 (1966). The specific question which Petitioner asks the Court to address is the Constitutional effectiveness of warnings under circumstances where the officer initially reads the Miranda warning off of a standard warning card, but where he subsequently undertakes on his own to give the accused an explanation of those rights, in a manner which is inadequate, inaccurate, or misleading. We are not aware of any opinion of this Court that has addressed this precise issue.

The Miranda opinion is an eloquent discourse on the reasons why the Fifth Amendment right against self-incrimination must be zealously safeguarded against the inherently undermining effects of custodial interrogation. At the core of this Court's holding in Miranda is the premise that although the right to silence may be waived under certain circumstances, one may not be held to knowingly and intelligently abdicate a right which one effectively does not know one has. 384 U.S. at 436. Hence, the requirement that the warnings of one's Constitutional rights must be full and effective. 384 U.S. at 445. It is Petitioner's contention that such warnings must also be accurate, for if they are not accurate statements of the accused's rights, then such warnings cannot possibly be said to be either full or effective.

At Petitioner's trial, his mental competence to stand trial was not in issue. What was disputed, however, was the question of whether he had knowingly and intelligently waived his right to silence by giving authorities two confessions which were used to obtain his conviction and death sentence. Petitioner has not, and does not now, contend that these convictions were extracted through overt physical brutality. Rather, he contends that the inadequacy and inaccuracy of the explanatory warnings given to him by Detective Michalec, viewed in concert with the total circumstances surrounding his arrest and interrogation, should have rendered his confessions inadmissable. The question of voluntariness is not, per se , the determinative issue in this case; even if this Court were to conclude that Mr. De La Rosa's statements were entirely voluntary, such statements must still be considered inadmissable if obtained after the administration

of inadequate Miranda warnings. [6] Michigan v. Mosely, 423 U.S 96, on remand, People v. Mosely, 249 N.W.2d 393, aff'd, 254 N.W.2d 29, cert. denied, 434 U.S. 861 (1975). The critical determination to be made in this case is whether Petitioner can be held to have freely, knowingly, and intelligently waived rights about which he was substantially misinformed by the police.

In reviewing this question, it is appropriate to inquire into the circumstances of the Petitioner at the time of arrest and interrogation. This Court has recognized that modern custodial interrogation is more psychologically than physically oriented; 384 U.S. at 448; thus, the psychological and intellectual condition of the Petitioner is one among several factors which the Court may consider.

At the time of his arrest, Petitioner was an 18 year old Mexican- American indigent (Tr. P. 47). At the time of the motion to suppress, conflicting expert opinions were elicited regarding the the intellectual capacity of Petitioner to understand a Miranda warning. The state's witness, Dr. Betty Lou Schroeder,[7] testified to the effect that Petitioner had the requisite intellect to be capable of knowingly and intelligently waiving his rights. (III, P. 38-79). The defense psychologist, Dr. Charles Bisbee, entertained a contrary opinion and testified that Petitioner would not have had the requisite intellectual capacity to fully comprehend the warnings, nor to make knowing or intelligent decisions regarding the waiver of his rights, due to his subnormal intelligence. (II, P. 88-203).

It was not disputed, however, that the state's psychologist, Dr. Schroeder, examined and tested Petitioner on the day after his arrest (III, P. 24, 29), and had found his verbal IQ to be 70, considered borderline retarded. (III, P. 51). His reading comprehension was tested and found to be at the fourth grade level.

---

6. Petitioner does not concede the voluntariness of his confessions; rather, he contends that even a finding of voluntariness would not preclude the Court from reviewing the issue of whether he was adequately warned of his rights.

7. Dr. Schroeder testified at the motion to suppress, but not at trial. The trial court excluded the testimony of four state psychiatrists and psychologists (Drs. Keedy, Sparks, Cameron and Schroeder) inasmuch as all had interviewed Petitioner in violation of Smith v. Estelle, 451 U.S. 454 (1981).

(III. P. 49-50).

Although it is "not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations", 384 U.S. at 468, the youth and subnormal intelligence of Petitioner are factors which, in all likelihood, aggravated the inadequacy of the warnings which he was given.

The arresting officer testified that he made it a regular practice with all arrestees to explain the Miranda warning in lay language. (XVIII 90-93, II 211) That the officer felt it was necessary to offer such explanations to all arrestees may lend credence to the proposition that it is sometimes difficult even for people of normal intelligence to fully comprehend the formal language of the Miranda warning when placed under the stress of apprehension, arrest, and/or custodial interrogation. Such factors, however, generally operate to the greater detriment of persons of limited intelligence, such as Petitioner.

The sua sponte offering of incomplete or misleading explanatory warnings by an officer to an accused presents a Constitutional problem in two respects. The first is in those situations where the accused is mentally incapable of understanding the formal text of the Miranda warning. In such instances, the accused must rely upon the officer's explanations if he is to acquire a grasp of his Constitutional rights sufficient to waive them. At that point, the supporting "explanations" become indispensable to, and an integral part of, the formal warning itself. If, however, the formal warning is not understood by the accused, and further, if the necessary explanations are inadequate and misleading, how may it be said that the accused was afforded the full and effective warning to which he is entitled?

The second problem arises in those situations wherein the accused may be of normal intelligence and capable of understanding the Miranda warning without explanation. When the officer nevertheless proceeds to offer supplemental explanations to the accused which are inaccurate or at variance with the formal warning, then an ambiguity may be created in the mind of even a normally intelli-

gent arrestee as to what his rights actually are. The creation of such ambiguity does not comport with the requirement that warnings as to a person's Constitutional rights must be clear, unequivocal, and expressed. Lathers v. U.S., 396 F. 2d 524 (5th Cir. 1968); Miranda v. Arizona, supra, at 467-68, 473. As the Court of Appeals pointed out in Lathers,

> "In our constitutional supervision of the interrogation process we should not be obsessed by petty irregularities in sentence syntax. We must, however, be keenly aware of both semantics and the law of probabilities. Moreover, when the prerogative of obscurantism rests with the government, the burden falls squarely on the government's shoulders to prove an offer [of the right to appointed counsel] without equivocation or ambivalence." Id. at 535.

Just as the burden of inquiry as to his rights does not rest upon the accused, Miranda at P. 470-71, likewise it should not be the burden of the accused to have to resolve inconsistencies and ambiguities between what the formal warning states on the one hand, and what the police officer is telling him on the other. A criminal defendant must have accurate information as to his rights, for he must utilize this information in examining his options and in making judgments and decisions as to whether he should waive these rights. This is especially true where the accused is subjected to custodial interrogation aimed at the solicitation of a confession. In a case such as the instant one, where the accused is first told that he has a present right to appointed counsel prior to and during questioning, but is subsequently told that this is not really the case and that the acquisition of appointed counsel will not occur until some time has passed and the court has "gotten around to it", how is the accused to know whom to believe as he takes this information into account in choosing among his available options? By offering an explanation to the accused, the officer impliedly says to the arrestee, " This formal warning is something I have a duty to read to you as a police officer, but this is what it really means." From that time on, each time the accused is read the formal warning, he will continue to interpret it in light of what the police officer has told him it "really means." When faced with the immediate pressures and

inherently coercive techniques of custodial interrogation, Miranda at 461, the accused may not have the time or opportunity to find out whether the officer has spoken truthfully before he succumbs to the interrogating officer's will. Prolonged incognito interrogation max tax the fortitude of even the most strong-minded of criminal defendants; it would seem axiomatic that those arrestees who are the least well-informed or the most confused regarding their rights will be the easiest prey for the law enforcement officer who is skilled in interrogation.

Petitioner concedes that law enforcement officers are not at the present time under a mandate from this Court to offer any specific words of explanation of the Miranda warning to an accused, nor does Petitioner ask the Court to promulgate such a rule. The proposition put forth by Petitioner is that once an officer, for whatever reason, affirmatively chooses sua sponte to offer explanations of the Miranda warning, then those explanations become warnings in and of themselves. At that point, Petitioner contends the officer becomes obligated to make sure that his explanations constitute accurate and adequate representations of the accused's rights. At the very least, it should be incumbent upon the officer to refrain from misinforming the accused as to one or more of his Constitutional rights.

In the instant case, both the arresting and interrogating officers chose, of their own volition, to explain he Miranda warning, either because they believed Petitioner was mentally deficient and in need of such an explanation, or because it was their practice to do so with all arrestees.

Arresting Officer Vaquera's explanatory warning of the right to counsel, administered in "street" Spanish, was simply the statement, "Do you want a lawyer". This was not an effective substitute for the full warning. An effective substitute might have been a warning such as:" Jesse, you have a right to not not say a word to any of us officers until you have a lawyer, and if you don't have money for a lawyer, then the government will pay for one for you, and that lawyer can be with you at the police station where we are taking you, and he can be there to talk

with you before we ask you any questions, and he can stay with you all the time we are asking you any questions."

This was not the type of explanatory warning offered by Officer Vaquera. Merely asking the accused whether he wants a lawyer does not serve to adequately inform the accused of his right to the presence of appointed counsel prior to and during questioning.

We believe the warnings administered by Officer Michalec, however, to have been far more deficient and misleading. Broken down into its constituent parts, Detective Michalec's warning was as follows:

> "I was explaining that ... he has the right to get an attorney if he wants one..." (II, P. 211)

This portion of the warning is deficient because it does not convey when such counsel may be consulted, to wit: prior to and during questioning. The right to the presence of counsel is of such import that it is considered indispensable to the preservation of the Fifth Amendment right to silence. Miranda, supra, at 469. Informing the accused of his right to counsel, without explicitly advising him that it is a present right, omits what is most valuable about the privilege.

> ***
> "/_if_7 not an attorney will be appointed free of charge and I generally try to make -- I tell them that it will take some time before the Court will get around to appointing a lawyer for them"(II, P. 211) (emphasis supplied)

This statement is objectionable, first, because it is false and misleading to the accused. Indigent defendants, particularly those charged with capital crimes, may have counsel immediately appointed by the arraigning magistrate.[7a] The record reflects that Officer Michalec was aware that this was so. (II, P. 249,255). In truth, this is exactly what occurred when Petitioner was finally brought before a magistrate at 10:40 p.m.; i.e., counsel was appointed immediately.

Yet Detective Michalec's warning on its face communicated to the Petitioner that the acquisition of an appointed lawyer was a potentially time-consuming process - indeed, something the court would have to eventually "get around to". For an officer to advise an accused of his present right to counsel, and in the next

---

7a. This is the case in Bexar County, Texas, a major metropolitan area. Petitioner does not contend that it is the cas n all localities.

breath tell him that this right does not really mean all it says, it akin to offering a starving man bread, if only he is willing to wait until some unspecified future time when someone can "get around to" attending to his need. In both cases, the future may be too late. The stress and fear attendant to custodial interrogation are immediate to an accused. When faced with this type of inherently coercive situation, Miranda at 457-8, a precious Constitutional right may easily be made to appear less valuable and not worth invoking if the accused is led to believe that there will be a substantial delay before he may avail himself of its protections and if in the meantime he remains subject to the demands of his interrogators.

The warning was deficient in a second respect, in that it made the right to counsel appear to be something linked to some future event. This type of warning was found to be impermissable in Lathers v. U.S, 396 F. 2d 524 (5th Cir. 1968). In Lathers, the accused was advised that "if he was unable to hire an attorney, the comissioner or the court would appoint one for him." Id. at 535. The warning was found to be deficient because it did not lay out in clear terms the full extent of the defendant's rights; specifically, he was not advised that he could have an attorney appointed and present with him before questioning.

We believe the warning in the instant case to be far more objectionable than the one in Lathers. In this case, the officer not only failed to apprise Petitioner of the full extent of his right to counsel prior to and during questioning, but went beyond that point and affirmatively misrepresented to the accused that it would not be practicable for him to obtain appointed counsel until some point in the future. The officer's error, then was not only one of omission, but of comission.

In California v. Prysock, 453 U.S. 355 (1981) this Court adopted a position similar to that expressed in Lathers, i.e, that petty variations in the manner that warnings are administered will not, in themselves, cause the warning to be deficient. Hence no magic incantation is required, wherein the words must be uttered in a particular order. In Prysock, however, this Court did not hesitate to reaffirm the principal that a warning is insufficient if the right to appointed counsel is linked with some future event,

particularly if that future time is after interrogation.

In the instant case, the officer's warning left the Petitioner in a position of total uncertainty as to when he might be able to obtain counsel. Without intending to engage in "petty arguments of syntax", we feel compelled to point out that the use of the words "get around to appointing him a lawyer" is not the kind of petty irregularity which the Court spoke of in Prysock. The import of such words is that of a leisurely, or even indifferent attitude on the part of the judge who would assign counsel to Petitioner's case; someone who would, after an unknown length of time, finish with all of the more important tasks assigned to him, whereupon he would finally get around to the less pressing matter of appointing counsel. Inasmuch as Petitioner had not been brought before a magistrate,it is possible or even probable that he was unaware that counsel could be appointed for him at a nighttime arraignment. Since he was arrested after business hours on a Wednesday night, the officer's words were clearly open to the interpretation that "it would take time" - meaning the next business day when the Courthouse was open. The officer gave Petitioner no reason to believe that interrogation would cease, however, during the fourteen hour interval between the time of the arrest and the commencement of the following business day. We believe that the officer's statement, taken as a whole, was clearly open to the construction that counsel would not be obtainable until after interrogation had commenced. Like the warning in Lathers, the message to the accused was only"that a judge or commissioner somewhere down the line would appoint him a lawyer if he so requested." Lathers, at 535.

> ***
> "And I explained to him that really what the whole warning means they don't have to say anything to us if they don't want to." (II, P. 212)

This portion of the officer's statement is objectionable and inadequate because it is incomplete. The officer's shorthand rendition is, in fact, not what the whole warning really means. It fails to mention Petitioner's right to the presence of counsel, as well as his continuing right to invoke his constitutional privi-

leges at any stage of the proceedings. Equally as important as the foregoing is the accused's right to know the consequences that will accrue to him as a result of a waiver of his rights. Miranda, at 469. Thus, the officer's failure to admonish Petitioner that anything he said could be used against him constituted a critical omission. [8]

Petitioner contends that the mere fact that he was read the Miranda warning prior to each of his confessions does not mitigate the prejudice done to his Fifth Amendment rights, in light of the officer's admission that on each occasion, he repeated his admonition that it would take time before the court would get around to appointing counsel. Nor does the occurrence of an approximate ten minute lapse between the first confession and the second detract from the pressure of Petitioner's custodial interrogation. This interval was utilized to have the confession witnessed; it in no way represented a period wherein Petitioner was either free from Detective Michalec's custody or free to confer with an attorney. Petitioner's situation was analogous to that of the defendant in Westover v. U.S., (No. 761), 384 U.S. at 494 (1966). Like the defendant in the cited case, Petitioner was held in custodial interrogation for a period of several hours (6:00 p.m. until 10:40). Although the two crimes for which Michalec interrogated the Petitioner were different, they arose out of a a continuous criminal episode, and the impact upon Petitioner was that of a continuous period of questioning. Id. at 496.

Additional justification for requiring that officers' explanations of Miranda warnings be accurate and adequate is presented by the fact that the mere act of offering explanations to the accused may open the doors to prejudice of his rights. The officer, by offering an explanation of the Miranda warning to an accused who is frightened, confused or of low intellect,

---

8. This omission may have been peculiarly prejudicial in Petitioner's case. Although Petitioner had no record of any prior felony or misdemeanor convictions, he had been brought to police headquarters for questioning regarding a murder case, prior to the instant offense. On that occasion, he was not arraigned. He was interrogated, gave a statement to police, and was forthwith released without charges. If Petitioner's experience was to be his guide, and in the absence of an explanatory warning that what he said could be used to incriminate him, he may have thought that in the instant case, confession was his fastest route to release. (II, 232-34).

may appear to be doing a favor for the accused or being of assistance to him, not unlike the insurance agent whose confused customer is appreciative when the fine print in a policy is explained "in plain English." As this Court noted in Miranda, however, assuming a posture of kindness and fairness is one of the fundamental techniques of police interrogation. Miranda, at 451-3. This may be a source of prejudice to the accused, who is distracted from the reality that the officer is not on his side.

The State bears the burden of showing that the accused has knowingly and intelligently waived his rights to silence and to counsel. "A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Miranda, supra at 475, quoting, Carnley v. Cochran, 369 U.S. 506 (1962).

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Id at 475.

In this case, the requirement of waiver is not met. Just as Petitioner may not be held to have waived a right which he did not know he had, he may not be held to have rejected a present offer of counsel when, in fact, the officer's statements told him that no such offer was presently available to him. Because the officer's statements were materially misleading and appeared to diminish Petitioner's present right to counsel, making it conditional on some future time, we respectfully submit that Petitioner was neither fully nor effectively informed of his Constitutional rights prior to giving his statements. His confessions should not have been admissable at his trial.

QUESTION NUMBER TWO

Whether Petitioner's written confessions were inadmissable as having been obtained during custodial interrogation in a manner violative of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel, resulting from unreasonable delay in bringing Petitioner before a magistrate.

A. Statement Of Pertinent Facts

Petitioner was arrested at 5:30 p.m. at a site approximately five miles away from the San Antonio Police Department and the Justice Courts of Bexar County. (II, P. 259). He was brought to the police station at 6:00 p.m., fingerprinted, and immediately placed in custodial interrogation with Detective Michalec. (II, P. 212, XVI, P. 142-143). The Justice Courts were located in the jail complex, directly across the street from the robbery office where Petitioner was being held. (XVI, P. 160-161). The interrogating officer, Detective Michalec, testified that he made no attempt to bring Petitioner before a magistrate, (XVI, 141) nor did he ever check to see if one of the several justices of the peace or other judges were available at this time. (XVIII, P. 94, 95). He stated that no check was made because he did not want the magistrate. (II, P. 261). Due the officer's failure to make even a cursory check on the availability of a magistrate, the record is silent as to whether one was available between the hours of 6:00 and 8:00 p.m. It is known, however, that a magistrate was on duty from 8:00 on, and that the officer was aware of this fact. (II, P. 260). The night magistrate's office was located in the police station, only one floor below the robbery office were Detective Michalec was interrogating Petitioner. (II, P. 260-61).

Detective Michalec began eliciting an oral statement from Petitioner at 6:45 p.m. (XXI, Ex. 32) This was immediately after Petitioner saw his wife, brother and friend and knew that they were being held in custody. (II, P. 213) The first confession ended a few minutes before 8:00. The officer began eliciting a second confession at 8:02 p.m. At the time this second confession (the confession to the capital murder) was being taken, Detective Michalec was aware that a magistrate was on duty. Petitioner was not, however, brought before the magistrate. The officer continued to interrogate Petitioner and elicit incriminating statements from him until approximately 10:40 p.m. At that point, and not until after two confessions had been obtained, Petitioner was brought before magistrate Mary Elizabeth Ladd, who advised Petitioner of his rights, set bond, and immediately appointed counsel. (II, P.

250-252; II, P. 254; XVI, P. 122; XVI, P. 150).

Prior to the eliciting of each of his confessions, Petitioner had been told by the interrogating officer that it would take some time before a court got around to appointing him a lawyer. These statements were made despite the officer's awareness that a magistrate could appoint counsel immediately at arraignment. (II, P. 249). Petitioner had no counsel with him prior to or during interrogation, and during the questioning, his wife, brother and friend were held in custody. They were not released until after Petitioner had signed two confessions. (II, P. 257).

The officer testified at trial that because of the scarcity of other evidence in the murder, he would not have had much of a case in the absence of a confession. (II, P. 242) This suggests motivations the officer may have had regarding the obtaining of a confession. The testimony of the interrogating officer reflected that the delay in bringing Petitioner before a magistrate, even after one became available at 8:00, was solely attributable to the fact that (1) he did not wish to bring Petitioner to a magistrate until after he had finished getting a confession; (2) that despite the availability of a magistrate, he did not want her while he was interrogating the Petitioner; and (3) that as a standard policy, he refrained from bringing arrestees before the magistrate and instead took them to the homicide office for interrogation. The excerpts from the record relevant to the issue of unreasonable delay are as follows:

> "Q. Okay. What time did he get over to the magistrate?
>
> A. We brought him to the magistrate after the second confession was taken from him at night. It was probably 10:00 o'clock or so. We took him before Sharon Ladd.
>
> Q. Let me show you Defendant's Exhibit D and down there at the bottom it has 22:40, I believe, which I think is 10:40 p.m.?
>
> A. Right.
>
> Q. On the same date that he was arrested. So that's five hours after he was arrested you got him to a magistrate?
>
> A. Uh-huh.
>
> Q. Why, Detective Michalec, didn't you take him directly to a magistrate?
>
> A. Because we took him up to the homicide office for questioning.

Q. Why didn't you take him directly to a magistrate?

A. We just don't. It's just standard operating procedure.

Q. It's too difficult to get a confession, is it not, when someone's been warned by a Judge, someone separate and apart from a police officer, of his Constitutional Right. It makes it far more difficult to get a confession in that way?

A. Are you telling me that or are you asking me that.

Q. Would you agree with that?

A. I don't think so.

Q. You don't think so?

A. No. I don't see why.

Q. You wouldn't take him before the magistrate first so he could be advised of his Constitutional Rights before a judicial officer?

A. We don't do that. It's not policy. We take somebody and we question them and we handle it this way.

Q. It's not policy in the -- it's policy of the San Antonio Police not to follow the law?

A. Well, I don't know if it's a question of law. We don't do it.

Q. You don't follow the law that a defendant shall be immediately taken before a magistrate?

A. As far as -- We didn't that night and that's about all I can tell you. Now, as far as you questioning me why we didn't do it, we just don't do it and we don't in most cases. We don't take them directly to a magistrate. We take them to the homicide office and we talk to them first. (II, Pages 250, line 23 through 252, line 23).

Q. How -- the place of arrest on Remolino near General McMullen, that's located in San Antonio, Bexar County, Texas?

A. Yes, sir.

Q. That's - how far is it from the police station?

A. Probably about five miles.

Q. And the police station right across the street from the Bexar County Jail Annex where the Courts are located and night magistrate located there at the time?

A. The Courts are. I don't know if the judges are.

Q. Did you go over to magistrate Jesse De La Rosa.

A. No. We took Jesse to Elizabeth Ladd - Judge Ladd's office was located inside the police station in the court section.

Q. All right. So at most, let's say from the place of arrest, you were fifteen minutes away from a judge?

A. The night magistrate don't come on duty until 8:00 o'clock.

Q. They were -- and at 8:00 o'clock at the time that I think that the - that would have been two minutes before you had the confession of the capital murder, you were merely just down the hall or the next floor away from the magistrate?

A. I guess I would have been, if you want to say that, sure.

Q. I don't want to say anything. You just tell me.

A. We was on the second floor and her office is on the first floor.

Q. A matter of yards away?

A. I don't know if you would consider it yards. It was between floors, just like I told you.

Q. And you're testifying about your knowledge at the time also - what I'm saying is you knew at the time that the magistrate was downstairs?

A. I wouldn't- unless I would have called down there and actually wanted her, which I didn't at the time. I was taking confessions from him and I took him down there after I completed them.

Q. You never took the trouble to call down there.

A. Well, I wasn't going to take him down there. It's not our policy to take him down there. And I just took both confessions and then we had him magistrated. (II, Pages 259, line 18 through P. 261, line 20).

Q. Are you aware of the fact that you are to take an arrested person before a magistrate as soon as possible?

A. Well, understood as soon as possible.

Q. Okay. And what detained you from taking Mr. De La Rosa before a judge so that he could have an officer - excuse me - have an attorney appointed? What was it that detained you in this particular case?

A. Because I was taking a statement from him and I was talking to him.

Q. So you were going to wait until after you took the statement from him and then take him to the magistrate?

A. That was as soon as possible to me.

Q. You made no attempt to try to contact any judge, did you?

A. Not until he was taken down to Ms. Ladd, magistrated and he was read his rights by her, I witnessed that.

Q. You made no attempt to contact any judge until after you had taken a statement from him?

A. No, I didn't because it was as soon as possible as far as I was concerned. (XVIII, P. 94, line 9 through P. 95, line 7).

Q. Did you make any attempt to take Mr. De La Rosa before a magistrate?

A. No.

Q. Okay. You are familiar with the requirements of the law to immediately take a person before a magistrate?

A. Are you telling me I'm familiar or are you asking me?

Q. Well, either way. That's the law. Are you familiar with the law that requires you to take a person immediately before a magistrate?

A. From what I understand as soon as possible.

Q. What I'm asking you, you are familiar with that. Did you make any attempt to contact any magistrate?

A. No, not at the time we took him. We took him as soon as possible.

Q. Did you say, No., was the first thing?

A. Well, we didn't make any attempt at the time. The night magistrate at the police department comes on at 8:00 o'clock in the evening.

Q. Did you make any attempt to find out if any of the municipal court judges were in their chambers?

A. I didn't.

Q. You made no attempt to see the (sic) if Judge Gutierrez or Judge Esquivel were in their chambers, JPs located right across the street are they not?

A. I just told you, I didn't contact anybody.

Q. You made no attempts whatsoever to find a lawful magistrate to take him to the court?

A. That's what I said at first.

Q. So the very first thing that you did was, without taking him before a magistrate or without any attempts to do so, it was to take him to the police station for interrogation?

A. That's correct." (SVI, P. 141, line 16 through P. 143, line 4).

B. How The Question Was Raised and Disposed Of Below

The inadmissability of Petitioner's confessions as having been obtained following unreasonable delay in bringing him before the magistrate was raised at Petitioner's Motion to Supress. The Petitioner's objection to the admission of his confessions was reiterated at all appropriate times during the trial.

The error was raised in three grounds of error before the Court of Criminal Appeals. (Appellant's Brief, P. 27 et. seq.). In its opinion below, the Court of Criminal Appeals overruled the grounds of error. (Appendix A, P. 5). The Court of Criminal Appeals found only that the night magistrate came on duty at 8:00. It did not state in its opinion why this should be held to have constituted an excuse for withholding arraignment until 10:40 p.m. The Court did not address itself to the officer's admitted failure to make any attempt whatsoever to have the Petitioner brought before a magistrate, or to check on whether a magistrate might be available prior to the time the night magistrate came on duty. Finally, the Court of Criminal Appeals wholly failed to address the most critical issue, to wit: that the failure to arraign the Petitioner was not due to either unavailability nor to justifiable circumstances, but to the conscious intention of the police officer to keep

Petitioner in custodial interrogation until he had finished obtaining a confession.

C. Reasons For Granting The Writ

Petitioner contends that his appearance before the magistrate was preceded by unreasonable delay, during which time he was kept in continual custodial interrogation. Because the fruits of this interrogation without arraignment were the two confessions used to convict Petitioner, he asserts that these confessions should have been held inadmissable at trial, as having been obtained in violation of his Fifth Amendment right against compulsory self-incrimination and his Sixth Amendment right to counsel.

The rule that an accused must be brought before a magistrate as soon as possible following his arrest is a prophylactic measure designed to ensure the protection of the Fifth Amendment rights of an arrestee. Miranda v. Arizona, 384 U.S. 436, at 463 (1966). This policy, enunciated in McNabb v. U.S., 318 U.S. 332 (1943) and Mallory v. U.S., 354 U.S. 449 (1957) is further codified in Rule 5(a) of the Federal Rules of Criminal Procedure. Although the McNabb-Mallory doctrine is, per se, a federal exclusionary rule, its principles relate to the protection of an individual's Fifth and Sixth Amendment rights, and as such, may apply via the due process clause of the Fourteenth Amendment where the defendant contends that his confession was improperly elicited following unreasonable delay in arraignment. Moreover, the language and intent of the federal rule is echoed in Article 15.17 of the Texas Code of Criminal Procedure, which states:

> "Art. 15.17. Duties of the Arresting Officer and Magistrate
> (a) In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law."

The provisions of Article 15.17 (a) regarding the arraignment of the accused without unnecessary delay were not observed in this case. Immediately after his arrest, Petitioner was told it would take time before the court would get around to appointing him an attorney. Although this was a very misleading admonishment, it was in a perverse sense true, since the officer, by refraining to have the Petitioner arraigned, was in a position to lengthen the amount of time it would take before Petitioner could receive appointed counsel. Petitioner was, by the officer's admission, immediately placed in custodial interrogation, while his wife, brother and friend were held in custody also. During the five hours that Petitioner was kept in interrogation, no attempt whatsoever was made to either locate a magistrate, or to bring Petitioner to the magistrate whom the officer knew was on duty. The officer, under repeated examination by defense counsel,persisted in his admissions that it was his standard policy to interrogate arrestees instead of arraigning them, that the only thing which detained him in bringing Petitioner before a magistrate was his decision that he would simply not do so until he had finished obtaining a confession, and that as far as he was concerned, "as soon as possible" meant after he had finished getting a confession.

The Court of Criminal Appeals appears to rely upon the fact that Petitioner received a Miranda warning prior to his confessions. The fact that Petitioner may have been given his Miranda warnings by the officer does not, however, cure the infringement upon his Fifth and Sixth Amendment rights resulting from his failure to receive those, as well as other, warnings from the magistrate. See, United States v. Hernandez, 574 F. 2d 1362 (5th Cir. 1978)(wherein the court found that far from mitigating the harm, the repeated administration of Miranda warnings actually exaccerbated it, as evidencing the fact that the police did not mean what they said.) Moreover, the controlling principal is that an accused has a right to be advised of his rights by a judicial officer, , rather than just by a police officer. Thomas v. United States, 394 F. 2d 247 (Tenth Cir. 1968), cert. denied , 394 U.S. 931.

The reasons for this are well known to this Court. First, under ordinary circumstances, the officer is alone with

the accused, and the interrogation is unrecorded. There is ordinarily no third party present to observe whether the officer has, in fact, admistered Miranda warnings in a proper fashion, if at all. Arraignment provides a means of ensuring that the accused is advised of his rights in a full and effective manner, by a judicial officer who is detached, who is not personally involved in the apprehension and prosecution of the accused as is the police officer, and who is therefore not personally motivated to infringe upon the arrestee's Constitutional rights.

Second, it is vital that law enforcement officers permit the accused to be arraigned inasmuch as it is an absolute prerequisite to receiving appointed counsel in most areas. A criminal defendant may repeatedly invoke his right to counsel, as did the defendant in Hernandez, supra, but in practical terms, unless he is arraigned, there is no one to hear his invocations but the officer who has restrained him. So long as the officer is in control of when the accused is arraigned, it is the officer who, in his sole discretion, controls the defendant's right of access to the only person who may appoint him counsel, that person being the magistrate. The facts in the instant case parallel those presented in Mallory, supra, wherein the defendant underwent five and one half hours of custodial interrogation at police headquarters, during which time arraignment could easily have been made in the same building in which the police headquarters were housed. Not until after Mallory had confessed, "when any judicial caution had lost its purpose, did the police arraign him." Id. at 1360. In reversing Mallory's conviction, this Court remarked:

> "We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard." Id. at 1360.

In the instant case, Detective Michalec averred that it simply was not his "policy" to bring arrestees before a magistrate prior to interrogation. This is a disturbing example of how the officer may exercise his discretion and thereby completely circumvent the intent of the arraignment rule. Most surprisingly, in his testimony at Petitioner's trial, Detective Michalec did not even attempt to attribute the delay in arraigning the Petitioner to any such "exceptional circumstances", as were referred to in Mallory. The

officer was remarkably frank in explaining that the only thing that detained him from arraigning the Petitioner was his election to keep the Petitioner in interrogation until after a confession had been obtained. Such conduct on the part of an officer is absolutely contrary to the repeated holdings of this and other courts that where an officer cannot justify his failure to promptly bring the accused before the magistrate, or where the officer delays arraignment in order to interrogate the accused or obtain evidence from him, then such delay is not reasonable. Mallory v. U.S., supra; Thomas v. U.S., supra; Cote v. U.S., 357 F.2d 789 (9th Cir. 1966); Smith v. U.S., 390 F.2d 401 (9th Cir. 1968); U.S. v. Marrero, 450 F.2d 373 (2nd Cir. 1971). In such cases, the defendant's confession is rendered inadmissable, notwithstanding the fact that it may have been voluntarily made. Dillon v. U.S., 391 F.2d 433 (10th Cir. 1968), citing, Walton v. U.S. 334 F.2d 343 (10th Cir. 1964), cert. denied Comley v. United States, 379 U.S. 991; Thomas v. U.S., supra.

It may be contended by the state of Texas that the conduct of custodial interrogation by Detective Michalec constituted a reasonable cause for delay in arraigning the Petitioner, and that he should not have been obligated to "interrupt" the confession process for the purpose of bringing Petitioner before the magistrate. We find this reasoning to be unpersuasive, for two reasons. First, this premise presumes that Detective Michalec was in the midst of taking a confession at the time a magistrate became available, and that arraingment would have constituted an interruption of this process. In truth and fact, the record reflects that Detective Michalec had already obtained the first confession and had not yet begun eliciting the second when the magistrate came on duty. Petitioner could have been brought before the magistrate without interrupting the taking of a confession, had the officer been of a mind to do so. Of course, whether the Petitioner would have resumed the confession process after being warned of his rights by the judge, and after having counsel appointed is another question. It is not unreasonable to assume that the availability and advice of counsel would likely have had a substantial impact on whether Petitioner waived his right to silence.

Realistically speaking, and bearing mind that this is a capital prosecution, it is unlikely that Petitioner would have given officers his capital murder confession had he been given access to the magistrate and, consequently, access to appointed counsel. Although this may be construed as spoiling the officer's opportunity to obtain a confession, such is a necessary price to be paid in order to safeguard the rights of the accused. The rule is designed not to maximize the chances for the police to obtain confessions, but rather, to maximize the defendant's opportunity to exercise his Constitutional rights.

The second weakness of this argument is that the perpetuation of incognito interrogation is a viable end in its own right, even if the delay of arraignment is a necessary means to that end. Such reasoning is diametrically opposed to the most important premise underlying the McNabb-Mallory doctrine; that is, that the purpose of arraignment as soon as possible following arrest is first and foremost to avoid all "the evil implications of secret interrogation by the police." Ricks v. U.S, 334 F.2d 964 (D.C. Cor. 1964); Smith v. U.S. supra . If, then, the conduct of incognito interrogation is the evil which the rule seeks to suppress, it simply cannot be rationally argued that the conduct of such interrogation and the avoidance of its interruption is a reasonable excuse for delay in complying with that very rule.

This case does not present the type of mitigating circumstances which have, in the past, been held to constitute a reasonable cause for delay in arraigning the accused. Such cases include Cote v. U.S., supra wherein the delay was occasioned by substantial distance and travel time between San Diego where the arrest was made and Las Vegas, where the warrant was issued: Dillon v. U.S., supra, wherein officers demonstrated that they had conducted a diligent search for a magistrate ; Smith v. U.S., supra, wherein there was no evidence that the state police attempted to interrogate the defendant or that the delay in arraignment was to facilitate interrogation; U.S. v. Bear Killer , 534 F.2d 2153 (8th Cir. 1976); wherein the delay in arraignment was due to

time afforded to defendant in which to sober up; U.S. v. Marrero, supra , wherein the defendant's admissions were not attributable to his arraignment having been delayed for purposes of facilitating interrogation.

In the instant case, by contrast, we find that the delay in arraignment was not only by design, but was for the purpose of permitting the interrogating officer to continue his custodial questioning of the accused, with the expressed intent that the Petitioner not be brought before the magistrate until after the officer had finished taking a confession from the accused. Even in the event that this Court chooses to disregard the complete failure of Detective Michalec to make any attempt to find a magistrate before 8:00, and in the further event the Court wishes to assume, arguendo, that there was no magistrate available in all of Bexar County until 8:00, that would nevertheless neither explain nor excuse the officer's failure to arraign Petitioner at 8:00 when he knew the magistrate was on duty. Because we do not believe that the requirements of bringing the accused before the magistrate without unnecessary delay were met in this case, and because we further believe that the prejudice to Petitioner's rights to counsel and to silence were abridged as a result of his statement having been taken under such circumstances, it is respectfully contended that Petitioner's confessions should not have been admissable at his trial.

QUESTION NUMBER THREE

Whether Petitioner was denied the right to a trial by a fair and impartial jury as the result of occurrences in the jury room during the deliberations on punishment, to wit;(1) erroneous statements made, and beliefs held, by three jurors regarding the Texas parole law and (2) prejudicial comments of a juror regarding future dangerousness, which were not based upon the sworn evidence, but upon the experiences of the juror's stepfather.

A. Statement of Pertinent Facts

Following Petitioner's trial and conviction, an evidentiary hearing was conducted on his motion for new trial (XXI, P. 2-363). All members of the jury were called to testify at this hearing about

remarks which were made during the deliberation on punishment, i.e., that stage of the trial wherein the jury answered special issues determinative of whether Petitioner would receive a life sentence or the death penalty.

The second special issue submitted to the jury required that it determine whether, from the evidence beyond a reasonable doubt, a probability existed that Petitioner would commit future acts of criminal violence that would constitute a continuing threat to society. (I-A, P. 259). In other words, the jury was asked to assess the Petitioner's future dangerousness.

During the punishment deliberations, juror Reverend Elmo Franklin, a 73 year old minister, expressed a personal opinion that when a person has killed once, it is easier for him to kill a second time. (XXI, P. 32). He then related the personal experience upon which this opinion was evidently based, to wit: that his stepfather had been convicted of murder and assessed a life sentence; but that he had later been paroled, and while released had committed another homicide.(XXI, P. 74-75). Although the juror may have been speaking to the foreman at the time, his story was nevertheless heard by the other jurors, seven of whom (besides Juror Franklin) recalled the incident quite clearly and testified about it some seven months after the trial. (XXI, PP. 31-33; 40-43; 58-61; 126-127; 142-143; 163-164; 192-193).[9]

While the jury was still engaged in its punishment deliberations, comments were made regarding the law of parole. Juror Ethel Hester asserted that Texas law had provided for parole in seven years in murder cases. (XXI, P. 213). She testified that another juror stated that parole could be obtained in 5 years. (XXI, 213.226). Referring to herself and another juror, Mrs. Hester stated that:

"A. Yes. We said could be five to seven years." (XXI, P. 226)

Juror Toshiko Evans stated that "it was easy to get parole in Bexar County, even for murder." (XXI, P. 186). All of the foregoing statements were innacurate, inasmuch as 20 years "straight time" is the minimum requirement for eligibility (not the actual granting) for parole in capital cases. Art. 42.12(c)(15)(b), Texas Code of Criminal Procedure.

9. The family background of Juror Franklin was made known to the defense until after the trial. (XXI, P. 103-114).

B. How The Question Was Raised and Disposed of Below

Following the conclusion of the trial, Petitioner filed a Motion For New Trial, wherein he alleged (1) that the jury had engaged in misconduct by discussing the parole laws; and (2) that the remarks of Juror Franklin constituted "new and unsworn evidence" which the jury should not have entertained. At the conclusion of an evidentiary hearing on the Motion, it was overruled without any findings by the Court as to the presence or absence of bias. (XXI, P. 363). The questions were raised in three grounds of error before the Texas Court of Criminal Appeals. One issue complained of the failure of Juror Franklin to reveal the information regarding his stepfather during voir dire on the grounds that had it been known to the defense, the juror would have been subject to challenge for cause as being biased. The Court overruled the error, stating that the defense had failed to ask a question during voir dire which was deliberately calculated to elicit the information compained of. On this basis, the Court concluded that the juror could not be found to have witheld the information. It is important to note that the Court of Criminal Appeals did not address the issue of bias and made no findings on that question. (Appendix A, p. 2).

The Court overruled the second two grounds of error, which complained of (1) prejudice occasioned by the jury's discussion of parole at the punishment deliberations and (2) the receipt of new and unsworn evidence in the form of Reverend Franklin's remarks. The Court of Criminal Appeals wholly sidestepped the issues of jury misconduct and new and unsworn evidence; it made no findings as to the absence of actual bias. Instead, it declined to consider the question at all, contending that "the comments" on which Petitioner's complaint were based were made after the verdict was reached, while the jurors were waiting to return to the courtroom. No citation to the record in included in the court's opinion, and it is difficult to know which "comments" it refers to in the opinion, inasmuch as two separate sets of comments were complained of, i.e., comments regarding parole and those of the Juror Franklin. The Court of Criminal Appeals makes reference to one juror who testified that the harmful "comments" were made after the verdict, and not

during punishment deliberations. Reference to the record will reflect that this was juror Toshiko Evans, who contended that the discussion of parole was had after the verdict. (XXI, P. 188). She was the only juror to so testify. Jurors Hrncir (the foreman), Davis, and Hester (the jurors who brought up the subject of parole), and Milne all testified that the discussion occurred during the punishment deliberations.[10] The state appellate court contended that the conflict in the evidence was for the trial court to decide; the trial court, however, made no findings on the issue and, in any event, would not have been at liberty to disregard the great preponderance of evidence pointing to the fact that the discussion of parole was had prior to the verdict on punishment. As for the comments of Reverend Franklin, all seven jurors who testified regarding his remarks stated that they were made during deliberations on punishment, prior to the verdict.[11] Not a single juror testified in a contrary manner. Petitioner is, quite frankly, at a loss to understand how the Court of Criminal Appeals could have concluded that such comments were made after the verdict, without even deeming it appropriate to refer to the record in support of its conclusion. Petitioner can only deduce that the Court of Criminal Appeals elected not to deal with the issues of bias, prejudice, and jury misconduct, and found this to be the most efficacious method of avoiding these questions. (Appendix A, P. 2).

C. Reasons For Granting The Writ

Petitioner asks this Court to review his contention that his Sixth Amendment right to a trial by a fair and impartial jury was infringed upon, as a result of comments made during the deliberations on punishment regarding Reverend Franklin's stepfather and the law of parole, all of which operated to Petitioner's prejudice.

From the outset, Petitioner relies upon the principle that the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. Moreover, the jurors' verdict must be based upon the evidence developed at the trial and none other, regardless of the heinousness of the crime, the apparent guilt of the defendant, or the station in life which the accused occupies. Irvin v. Dowd, 366 U.S. 717 (1961). In this case, Petitioner asserts that certain jurors harbored personal

10. XXI, PP. 27-38; 50-72 ; 198-277.
11. Jurors Milne, Cooper, Hrncir, Pacheco, Lucio, Sears and Evans

biases or prejudices not based upon the sworn evidence adduced at trial, and that the fact that such beliefs were held operated to deny Petitioner the fair trial to which he is Constitutionally entitled.

We are familiar with this Court's recent opinion in Smith v. Phillips, 102 S. Ct.940 (1982), wherein it is held that the only remedy which the defendant may demand in situations of this kind is an evidentiary hearing in the state court, which may make findings of fact as to the existence or non-existence of bias and whose findings shall be regarded as presumptively correct in the absence of convincing evidence otherwise. The majority appeared to further hold that such "convincing evidence" must be evidence of actual, rather than implied, bias, although Justice O'Connor points out in her concurring opinion that there is no precedent which would require that this Court bar the consideration of an implied bias question in certain appropriate circumstances.

The instant case presents a mixed question of actual and implied bias. While we are, for obvious reasons, inclined to agree with the opinion of the dissenting Justices that implied bias may pose a subtile yet insidious threat to the right of a fair trial, and that such implied bias should be subject to review by this Court, we nevertheless submit that the evidence in the present case is sufficiently clear and convincing to bring it within the purview of the "actual bias" standard set forth in the majority opinion.

Petitioner first submits that the Smith case presumes that the state court is, in fact, empowered to hold a hearing and make findings regarding juror prejudice. In Texas, however, that is not the case; thus the Petitioner is not possessed of the adequate remedy which the Smith case assumes he has, in the form of a state court new trial hearing. While the state district court is empowered to conduct a hearing on a motion for new trial, and in fact did so, it is nevertheless precluded by Article 40.07 of the Texas Code of Criminal Procedure from making findings of fact as to juror prejudice. The trial court in the instant case declined to make findings of fact based upon the dictates of this statute, which states:

> "Art. 40.07. Judge Not To Discuss Evidence
> In granting or refusing a new trial, the judge shall not sum up, discuss or comment upon the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either party. "

Petitioner therefore contends that, if for no other reason than the lack of a state factfinding mechanism, his claim of jury prejudice is reviewable by this Court as a Sixth Amendment question, via the due process clause of the Fourteenth Amendment.

With respect to the statements of Juror Elmo Franklin, the record reflects actual bias. While Petitioner does not assert that such bias is the result of hostility, animous, or ill will, it is a bias nonetheless. As a juror, Reverend Franklin was called upon to assess how Petitioner, who had been convicted of murder, would behave in the future. Juror Franklin, as the result of his stepfather's criminal history, had a biased view toward the way in which an individual who has killed once will behave in the future. He believed that such an individual would find it easier to kill again. If these personal beliefs, which were not derived from the sworn evidence, formed no part of his mental deliberations, then we might inquire as to why it is that Reverend Franklin mentioned these matters during the deliberations? The juror, who was speaking his mind, clearly had these past incidents on his mind or they would not have been brought up in the jury room. Although the story about Reverend Franklin's stepfather made sufficient impact to be recalled by seven of the eleven other jurors, seven months after the trial, we need not even reach the question of whether the other jurors were influenced in their decisions by his comments. It is enough that Reverend Franklin alone harbored this particular bias. The answers to the special issues by means of which the death penalty is imposed in the state of Texas must be affirmative and they must be unanimous. Art. 37.071, Texas Code of Criminal Procedure. Had there been even one individual on the jury, in lieu of Reverend Franklin, who did not possess his pre-formed opinion regarding future violence, it is possible that a unanimous verdict on that special issue would not have been obtained, thereby precluding the imposition of the death penalty.

With respect to the jurors' comments on the law of parole, we believe that the record clearly reflects the actual bias of those jurors who made the statements complained of. Juror Hester, in particular, appeared quite adamant in her opinions about the parole laws. When admonished by jury foreman Michael Hrncir that it was not proper to discuss parole during deliberations, Mrs.

Hester replied that the foreman's comments were ridiculous or absurd; (XXI, P. 258); that they did not comport with reality (XXI, P. 258), and that in many cases defendants had been in prison and had gotten out. (XXI, P. 55). The jury foreman testified that it required a second admonishment before he was able to put an end to the comments regarding parole. (XXI, P. 272).

Although Petitioner contends that the evidence reflects actual bias on the part of the jurors who made the statements about parole, he further contends that this is an appropriate case wherein the prejudice transmitted to the other members of the jury may be implied. The penal statutes of the state of Texas make no provision for the assessment of a sentence of life imprisonment without possibility of parole. The only options permitted to the jury are life imprisonment or death. Many jurors might consider a term of life imprisonment to be an appropriate or preferable alternative to death, whether because of their own conscientious scruples, or because of the presence of mitigating circumstances. Where, however, the statements of jurors make it appear that this life sentence will really be transformed into a mere five or seven year term, then we believe it may be fairly implied that most jurors would find such a punishment to be unconscionably short for an offense such as capital murder. Faced with a choice between the most severe penalty on the one hand, and one which appears too lenient on the other, the majority of jurors will opt for the more severe penalty. Likewise, where one or more jurors do not believe the death penalty to be justified, but wish to see the defendant incarcerated and removed from society, a term of life imprisonment may appear to be a viable option. Once the comments of a juror such as Mrs. Hester, or Mrs. Evans raise the spectre of the defendant being back out on the streets in a short five to seven years, the juror is led to believe that he has no choice but to assess the death penalty in order to preclude the possibility of early release of the defendant back into society.

It is these kinds of implied bias that Petitioner asserts cannot be effectively disclosed in a post-trial evidentiary hearing. Given the propensity among human beings in general for self-justification, it is very difficult to determine from a juror's own testimony after the verdict whether he was impartial. Smith, supra

at 952. This tendency toward self-justification is particularly strong in capital cases. Following the intense pressure, public scrutiny, and press coverage that is focused on most death penalty cases, how many jurors would permit themselves to admit that they had violated their oaths to consider only the evidence, or that they had, in the process, condemned a man to die unjustly? The court itself is not immune from such self-justification. Rare, indeed, is the trial judge who is willing to concede that a defendant did not receive a fair trial in his court.

Petitioner submits that due process requires that his trial be conducted before a jury capable and willing to decide his case solely on the evidence before it, and not on the basis of surmise, personal experiences, or prejudicial opinion. Irvin v. Dowd, supra. We believe that Petitioner was not afforded this facet of his right to due process - a right which should be vigorously protected where forfeiture of life may be the result. Because the state mechanism for factfinding is not an adequate remedy, and because sufficient actual bias is shown to bring this case within the ambit of Smith v. Phillips, this Court is respectfully requested to grant a writ to consider the issue of juror prejudice in this cause.

PRAYER

Wherefore, the foregoing premises considered, Petitioner respectfully prays that the Supreme Court of the United States issue its Writ of Certiorai to the Texas Court of Criminal Appeals for the purpose of reviewing the Constitutional questions raised herein.

Respectfully submitted,

CHRYSANTHE A. LAMBROS
RONALD P. GUYER
205 N. Presa Street
San Antonio, Texas 78205
(512) 299-1135

BY: Chrysanthe Lambros
CHRYSANTHE A. LAMBROS

Attorneys for Petitioner

RECEIVED
JUN 13 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

82-6922

IN THE SUPREME COURT OF THE UNITED STATES

JESSE DE LA ROSA

VS.

THE STATE OF TEXAS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Jesse De La Rosa, asks leave to file his Petition for Writ of Certiorari, attached hereto, without prepayment of costs and to proceed in forma pauperis. Petitioner would show unto the Court that he has previously been granted leave to so proceed in both the state criminal district court and the Court of Criminal Appeals of Texas. Petitioner would, additionally, show that he is presently incarcerated in the Ellis Unit of the Texas Department of Corrections, where he is imprisoned under a sentence of death. Under such circumstances, Petitioner has no access to the funds which which to pay the costs of his appeal to the Supreme Court of the United States. Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Jesse L. De La Rosa

JESSE DE LA ROSA, Petitioner

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Jesse De La Rosa, having been first duly sworn according to law, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

   No

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   No

3. Do you own any cash or checking or savings account?

   No

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property, excluding ordinary household furnishings and clothing?

   No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Maria De La Rosa, wife; Jesse De La Rosa, Jr., child

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jesse De La Rosa

Sworn to and subscribed before me this 3 day of June, 1983.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

ANNE WELLS
Notary Public, State of Texas
My Commission Expires 3-14-84

FILE

JESSE DE LA ROSA, Appellant

NO. 68,976 vs. - - - - Appeal from BEXAR County

THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for capital murder. Punishment is death, the jury having answered the punishment issues submitted to it affirmatively. Art. 37.071, V.A.C.C.P.

In over twenty grounds of error appellant raises issues concerning the jury selection process, jury misconduct during deliberations, the charge of the court on various issues, competency to stand trial, admissibility of the confession, bolstering, extraneous offenses and jury arguments.

In his first ground of error appellant contends a juror withheld information during voir dire. In his brief appellant argues the juror failed to reveal

> "(1) that his stepfather had been charged with, and convicted of, the offense of murder; (2) that he was imprisoned in the state penitentiary for this crime; (3) that his stepfather was later released from prison; and (4) that following his release, he again committed the offense of murder."

Before a conviction will be reversed on the ground urged, it must be shown that the information was in fact withheld. On this requirement the Court in Jones v. State, 596 S.W.2d 134, 137, stated:

> ". . . defense counsel has an obligation to ask questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial, truthful, and the like. Unless defense counsel asks such questions, we must hold, as we do here, that the purportedly material information which a juror fails to disclose is not really 'withheld' so as to constitute misconduct which would warrant a reversal." (citations omitted.)

Appellant, apparently in anticipation of this requirement, relies on four questions in his brief that the juror was allegedly asked. Our examination of the record at the points cited in the brief does not reveal "questions calculated to bring out" the information now contended to have been withheld. The question closest to the mark was this:

> "Have you ever had the occasion to be interested in the outcome of a criminal case? Have you ever had a particular case that caught your eye and you followed it, and watched the papers, and read about it?"

The answer to this question was:

> "Well, I can't recall anything that I followed through. I read occasionally but just didn't follow through on it."

It is apparent that the second question qualified or replaced the first, and that the juror answered the second question, not the first. It does not appear there was a diligent effort to learn whether the juror had any relative who had been convicted of a crime. The juror did not withhold facts about his stepfather (who had died approximately thirty years before).

The ground of error is overruled.

In the next two grounds of error appellant alleges jury misconduct and the receipt of new evidence during jury deliberations. Among the jurors testifying at the hearing on motion for new trial was one who testified that the comments on which appellant's grounds of error are based were made after the verdict was reached, while the jurors were waiting to return to the courtroom. Such conduct would not constitute grounds for a new trial because it occurred after completion of jury deliberations. The conflict in the evidence at the hearing on the motion for new trial was a matter for resolution by the trial court. McCartney v. State, 542 S.W.2d 156, 162. The grounds of error are overruled.

Next appellant asserts error is present in the jury charge because the paragraph applying the law to the facts authorizes conviction on a lesser culpable mental state (i.e., knowingly) than what the law and the indictment required (intentionally). Overlooked by appellant are the two paragraphs immediately before the one of which he complains. These paragraphs required the jury specifically find the matter urged by appellant before it could convict:

> "Before you would be warranted in convicting the defendant of capital murder, you must find beyond a reasonable doubt not only that on the occasion in question that the defendant, either acting alone or together with another as a party, was engaged in the commission of the felony of robbery, but also that during the commission of the robbery the defendant, either acting alone or together with another as a party, intentionally caused the death of the deceased by shooting the deceased with the intentions of thereby killing him.

> "Unless you find from the evidence beyond a reasonable doubt that the defendant, on the occasion in question either acting alone or together with another as a party to the offense, specifically intended to kill the said deceased when he shot Masoud Ghazali, if he did shoot him, you cannot convict the defendant of the offense of capital murder."

The ground of error is overruled.

In a later ground of error appellant challenges the last above quoted paragraph as constituting a comment on the weight of the evidence. He specifically attacks the phrase, "when he shot Masoud Ghazali." The next phrase, "if he did shoot him," eliminates the potential improper impact of the first phrase on the jury. Furthermore, the objection at trial made no assertion that the charge was a comment on the weight of the evidence, and therefore was not sufficient. Harrington v. State, 424 S.W.2d 237, 241. The ground of error is overruled.

The fifth ground of error contends the trial court should have conducted a competency hearing sua sponte. Art. 46.02, Sec. 2, V.A.C.C.P. That statute provides:

> "Sec. 2 (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.
>
> "(b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial."

The facts on which appellant relies concern events that occurred <u>before</u> trial, so by its terms Sec. 2(a), supra, not Sec. 2(b), applies. Under the terms of that provision the accused or his counsel may raise the issue by written motion (which was not done here, counsel expressly stating in the record that the defense did <u>not</u> desire to raise a competency issue), or the issue may be raised by the court sua sponte <u>only if</u> the court determines there is

evidence to support a finding of incompetency. The trial court here made no such finding.

Instead, what happened here was: when appellant presented evidence at a hearing on his motion to suppress the confession, he presented psychiatric evidence on the issue of his capacity to make a knowing and intelligent waiver of his constitutional rights. The trial court on this evidence thought competency might be in issue and ordered appellant examined by a psychiatrist. On advice of counsel, who had elected not to raise a competency issue and who was present at the scheduled examination, appellant refused to participate. We find the trial court's failure to conduct a competency hearing before trial was not error. Furthermore, we note that Sec. 2(b), supra, which is quoted in appellant's brief and relied on for this ground of error, applies to the issue of competency when raised by evidence during the course of the trial, and therefore does not apply here. The ground of error is without merit.

In his sixth ground of error appellant asserts it was error to deny a circumstantial evidence charge. Such a charge is no longer required in Texas. Hankins v. State, ____S.W.2d____ (No. 60914, 3/1/83). The ground of error is overruled.

Next appellant contends he was entitled to a charge on the lesser included offense of murder. In Wilder v. State, 583 S.W.2d 349, 361, a capital murder case in which the same issue was raised, the Court stated:

> "It is well established that a charge on a lesser included offense is not required unless there is testimony raising the issue that the accused, if guilty at all, is guilty of a lesser included offense included in the greater offense charged [citations omitted].
>
> "Appellants offered no evidence and did not testify. There is no evidence that they did not intend to kill the deceased while in the course of robbing him. There is nothing to show appellants would be guilty of only the lesser included offense of murder."

Such is the posture of this case. In his brief appellant merely argues that the jury could have disbelieved part of his confession

and thereby find him guilty only of murder. He presents no argument that evidence affirmatively raised the issue.

The ground of error is without merit.

The next four grounds of error concern the admissibility of appellant's confession. All four grounds relate to the failure to take appellant before a magistrate at the time of arrest, Art. 15.17, V.A.C.C.P., until after the confession was obtained. The first three of these grounds concern denial of the motion to suppress. The fourth concerns denial of a jury charge on the issue under Art. 15.17, V.A.C.C.P.

From the structure of appellant's argument it is apparent that he is aware of the requirement for presenting reversible error for admission of a confession when Art. 15.17, supra, is implicated. It must be shown that there was an unreasonable delay in taking the defendant before a magistrate, and that there is a causal connection between that delay and the making of the confession. Maloy v. State, 582 S.W.2d 125, 128; Myre v. State, 545 S.W.2d 824-825.

The record at the hearing on the motion to suppress shows appellant was arrested at about 5:30 in the afternoon, arrived at the police station about 6:00, and gave two confessions, the first at about 7:00 p.m. and the second at about 8:00 p.m. The night magistrate did not come on duty until 8:00 p.m. Appellant was warned of his constitutional rights when he was arrested and again when each confession was taken. When asked if he wanted an attorney, he said he would rather see his brother. After seeing his brother appellant said he wanted to confess, and the confessions were given. Viewing the evidence in the light most favorable to the trial court's ruling, the confession admitted at trial was not the result of any delay in taking appellant before a magistrate.

The jury was charged on the admissibility of the confession under Art. 38.22, V.A.C.C.P., and the facts of the case. The trial court refused to submit a charge under Art. 15.17, supra. The evidence before the jury showed appellant arrived at the police station after arrest at about 6:00 p.m., that the night magistrate was not on duty until 8:00 p.m., and that the confession was taken at 8:00 p.m. No evidence before the jury raised an issue that the confession was causally connected to any unreasonable delay.

These grounds of error concerning the confession are overruled.

In another four grounds of error appellant challenges the confession on other grounds and argues that without the confession the evidence is insufficient to support the conviction. This attack on the confession is predicated on the theory that the trial court's order for a psychiatric examination of appellant, discussed above under the fifth ground of error, evidenced a reasonable doubt by the trial court that appellant had sufficient intellectual capacity to make a knowing and intelligent waiver of constitutional rights. The record relied on by appellant does not show the trial court doubted his capacity. The court said if appellant's expert were believed, then a question of his competency to stand trial would be implicated as well. The trial court did not find appellant's expert was a credible witness, as is implicitly argued by appellant. The trier of fact is not bound, on the issue of intellectual capacity, by the testimony of experts. White v. State, 591 S.W.2d 851, 860. These additional grounds of error concerning the confession are likewise without merit and overruled.

In his twelfth ground of error appellant contends the state was erroneously permitted to bolster the witness who took appellant's confession. Actually, appellant complains that the officer was permitted to testify again after defensive evidence had been presented to the jury raising issues of whether the confession

was improperly obtained. As the state points out in its brief, ". . . the State must satisfactorily explain the accused's allegations of coercion in order to satisfy its burden of proof." Farr v. State, 519 S.W.2d 876, 800. It was not error to allow the witness to be recalled after the defense witnesses testified to specific allegations of improper acts. The ground of error is overruled.

Three grounds of error grouped together for argument in appellant's brief assert evidence of an extraneous offense was erroneously presented to the jury. The two confessions given by appellant after his arrest were for two different crimes that had been committed on the same night. The 8:00 p.m. confession was for the capital murder; the earlier confession was for another robbery. The testimony complained of was elicited during the state's attempt to show appellant understood the warnings he received before giving the confession admitted before the jury. When asked about earlier warnings the officer had given appellant, his answer referred to the giving of a statement. It did not indicate whether the statement was a confession to any offense, much less to an extraneous offense. The other incident of which appellant complains was even more innocuous: the officer was asked if he had ever explained to defendant his rights, and due to appellant's objection no answer was given. In both instances objections were sustained. This did not constitute evidence of an extraneous offense. It was not error to deny the motions for mistrial. The other two grounds of error argued together here, which assert reversible error for failure to approach the bench before asking these questions, pursuant to a motion in limine concerning extraneous offenses, and for the prosecutor's failure to instruct the witnesses not to volunteer evidence of extraneous offenses, are likewise without merit in light of our holding that no evidence of extraneous offenses was presented.

Two grounds of error complain of prosecutorial jury argument. The first refers to eleven instances. Appellant concedes that his objection was sustained in each instance. In only five instances was an adverse ruling secured when the motion for mistrial was denied after the jury had been instructed to disregard the argument. No reversible error is shown.

Appellant also argues the prosecutor erroneously argued the parole law. The record reflects:

> "Now, ladies and gentlemen, about three or four times during counsels argument, she mentioned that a life sentence meant that this defendant was going to spend the rest of his life in the Texas Department of Corrections, that he would never see the outside world. Something about being up to his neck in sand and never being able to see the outside world or never, ever having the hope of being out, and I would just want to point out to you, that the authority in this State that decides when a person gets out on any kind of a sentence, is strictly under the control of the Texas Board of Pardons and Paroles.
>
> "MS. LAMBROS: Your Honor, I object.
>
> "MR. RYMAN: May I finish my statement before--
>
> "MS. LAMBROS: I object. I'm objecting at this point. Your Honor, any discussion of parole in this case is entirely improper if Mr. Ryman has thoughts of parole for this man, perhaps he doubts whether this man is going to be a continuing threat to society.
>
> "THE COURT: State your objection.
>
> "MS. LAMBROS: Your Honor, my objection is that it is a violation of the Motion in Limine, it is improper jury argument. This jury's job is to decide what--
>
> "MR. RYMAN: She has already made her jury argument. If she wishes for an objection--may we approach the bench?
>
> "THE COURT: Your objection is overruled. Move on, Mr. Ryman.
>
> "MS. LAMBROS: Note our exception, Your Honor.
>
> "MR. RYMAN: Ladies and gentlemen, defense counsel is right. It's not proper for the State

> to talk about the Board of Pardons and Parol and what they do, but when she misleads the jury or in law they say 'opens the door.' I just don't want you to be misled in thinking that the life sentence necessarily means that the person spends the rest of his life in prison because that is strictly up to the Board of Pardons and Parol and you can't talk about what they do or how they decide it. But I didn't want you to be misled about that and I want you to remember that when you think about the proper disposition in this case."

The state's argument was invited by appellant's argument that a life sentence would mean spending the rest of his life in prison. The state's argument was not improper, because it restricted its reply to correcting the misstatement made in appellant's argument, and it also cautioned the jury that they could not consider what the Board of Pardons' and Parole might decide. The ground of error is overruled.

Finally, appellant asserts the cumulative effect of the various errors previously argued require reversal. Such a ground of error presents nothing for review. Davis v. State, 513 S.W.2d 928.

The judgment is affirmed.

ODOM, Judge

(Delivered March 9, 1983)

En Banc

Miller, J. not participating

Best Copy Available